**United Kingdom National Report – LIDC Congress Budapest 2018**

**Who is/should be liable for breaches of competition law: which rules should govern the attribution of civil and (where it exists) criminal liability to the company, parent company, management & employee?**

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## 1. OVERVIEW AND SUMMARY

1.1.1 This Report has been prepared to assist the International Rapporteur in reporting to the LIDC congress in Budapest in October 2018. It has been prepared in accordance with the Directives and Instructions issued by LIDC last amended in October 2014. It follows the structure of the questions for National Reporters that were issued in February 2018. The appendix to this Report details where each question has been answered. A draft version of this Report was circulated to members of the Competition Law Association ("**CLA**") in May 2018. This Report reflects the views expressed by CLA members at a meeting held on 30 May 2018 to discuss the draft.

1.1.2 As this Report notes, the UK competition regime has rules which govern the attribution of civil liability to the company and parent company, as well as the attribution of criminal liability to individuals (whether or not they occupy management positions within infringing businesses). The UK also has a director disqualification regime, under which directors of companies infringing competition law may be disqualified from acting as company directors for long periods of time.

1.1.3 The UK's enforcement powers against individuals have been underused: it appears that this relates to the difficulty in securing a criminal conviction against an individual for cartel behaviour in the Courts. However, there has been an increasing use of director disqualification powers in recent years. Enforcement against businesses has also lagged behind equivalent jurisdictions, such as Germany.

1.1.4 It appears that director disqualification against individuals strikes the right balance as a penalty which has widespread public support (unlike imprisonment) and which is achievable in a wide variety of cases. This Report recommends its continued use and suggests that the statutory powers of director disqualification be expanded to cover those who were not directors at the time of the infringement of competition law. Given the difficulties in bringing criminal cartel cases, and the disruption which they cause to civil enforcement and follow on damages actions, this Report recommends that criminal powers be reserved only for the most egregious cases. For these, as well as the serious political implications of doing so, this Report recommends that an EU-wide cartel offence is <u>not</u> introduced.

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1.1.5 Regular monitoring of public awareness of competition law should also be done in order to assess and maximise deterrence effects given that, even if enforcement is stepped up considerably, competition cases will still be relatively rare.

1.1.6 Finally, this Report notes that once the UK has left the EU (and so the European Competition Network ("**ECN**")), it will be able to enter into a new memorandum of understanding with the European Commission ("**Commission**"), which may allow for the use of evidence transmitted by the Commission in proceedings against individuals. This Report also notes that, given that the UK authorities would need to conduct dawn raids on UK soil on the Commission's behalf post-Brexit, UK authorities would also be able to do so in a manner which allowed the evidence collected to be used against individuals in domestic competition proceedings. Enforcement against individuals may well increase post-Brexit as a result.

## 2. THE LEGAL POSITION IN THE UK

### 2.1 Article 101/102 equivalents

2.1.1 The UK Competition Act[2] contains prohibitions against anticompetitive agreements between undertakings[3] (commonly referred to as the "**Chapter I Prohibition**") and abuses of dominance[4] (commonly referred to as the "**Chapter II Prohibition**"). The Chapter I and Chapter II Prohibitions are designed to mirror the prohibitions contained within Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**"), the main difference being that the UK prohibitions apply when trade within the UK has been affected, rather than trade between EU Member States. As with Article 101 and 102 TFEU, the Chapter I and Chapter II Prohibitions only apply to natural persons where the natural person is the undertaking[5].

2.1.2 This mirroring effect is complemented by a statutory principle[6] enshrined in the CA98 itself designed to "*ensure so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in law in relation to competition within the European Union*"[7].

### 2.2 Criminal offences

2 Competition Act 1998 ("**CA98**")

3 Section 2 CA98

4 Section 18 CA98

5 For example, a sole trader

6 Set out at Section 60 CA98

2.2.1 The criminal offence for breaches of competition law (commonly referred to as the "**cartel offence**") is not found in the CA98 but rather in the (amended) UK Enterprise Act 2002[8]. The cartel offence in its current form[9] (the "**new cartel offence**") has been in force since 1 April 2014. The previous cartel offence (the "**original cartel offence**") came into force on 20 June 2003, prior to which the UK had no dedicated cartel offence[10]. Given that there has never been a prosecution of the new cartel offence, this Report outlines the UK's experiences of both the new cartel offence and the original cartel offence. Given that the new cartel offence and the original cartel offence share certain similarities, this Report has found it useful to refer to the "**cartel offences"** when describing features common to the two.

2.2.2 As the names suggest, the cartel offences only cover certain types of anticompetitive agreements. Both cartel offences cover price fixing, supply/production limitation, market sharing, allocation of customers and bid rigging[11]. Abuses of dominance are not, in of themselves, criminalised[12]. The cartel offences do not apply solely to directors or senior management but instead apply to any natural person involved in the anticompetitive behaviour[13]. While no attempts have been made to pursue such cases against individuals, there is no reason why a prosecution could not be brought in relation to the cartel offences for the inchoate English law criminal offences related to attempting or conspiring to commit an offence, or encouraging/assisting another to commit an offence.

2.2.3 The original cartel offence had a dishonesty requirement, with an individual committing the offence needing to have been dishonest while doing so[14]. During the period in which the original cartel offence was in force, the *Ghosh* test[15] was the test used to ascertain whether a defendant had been dishonest. In order to be held to be dishonest under the *Ghosh* test, a defendant must be found (1) to have acted in a manner that a reasonable and honest person would consider to be dishonest; and (2) to have known that her actions were dishonest in the eyes of a reasonable and honest person. The second limb of the *Ghosh*

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7 Section 60(1) CA98

8 Enterprise Act 2002 ("**EA02**")

9 Rather than enshrining the cartel offence within a new Act, the UK the Enterprise and Regulatory Reform Act 2013 amended the existing EA02 offence

10 Cartelists *were* prosecuted for conspiracy to defraud on occasion where "aggravating" features of the cartel were present. However, there was nothing intrinsically criminal involved in entering a secret cartel. See *Norris v United States of America* [2008] UKHL 16 at paragraph 63

11 Section 188, EA02 (as amended and original)

12 Some behaviour could, however, be both an abuse of dominance *and* a crime

13 The cartel offences apply only to natural persons

14 Section 188(1) EA02 (original)

15 From *R v Ghosh* [1982] EWCA Crim 2

test was struck down by the UK Supreme Court in 2017[16], meaning that a defendant no longer needs to have known that her actions were dishonest in order to be held to have been dishonest. Case law in English law is retrospective (unlike the vast majority of criminal statutes, including the new cartel offence), meaning that the revised dishonesty test will apply to any future prosecution based on the original cartel offence (i.e. for conduct predating 1 April 2014).

2.2.4 As is normal in English criminal law and unlike the situation in many jurisdictions (including the European Commission's ("**Commission**") powers to enforce Articles 101 and 102 TFEU[17]), there is no statute of limitations for either the cartel offences[18] or for the Chapter I and Chapter II Prohibition[19]. Given that the UK's competition authorities are not subject to the same limitation period as the Commission, the UK authorities may also enforce Articles 101 and 102 TFEU after the Commission's own limitation period has expired[20].

2.2.5 The new cartel offence does not have a dishonesty requirement, with the amended EA02 instead introducing two new sections setting out circumstances in which the new cartel offence is not committed[21] (which a prosecutor must prove beyond reasonable doubt *do not* apply) and defences to the new cartel offence[22] (which a defendant must prove on a balance of probabilities *do* apply).

2.2.6 The exemptions all relate to where the prima facie infringements have been publicised in some way (the "**Publication Exemptions**"). The new cartel offence is not committed where, under the prima facie infringing arrangements, customers would have foreknowledge of the arrangements prior to entering into a supply agreement[23], or (in the case of bid rigging) at the time that bids were made[24]. No offence is committed where relevant information regarding the arrangements is published in the

16 In *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67

17 Article 25 of European Council Regulation 1/2003 (the "**Procedural Regulation**") provides for a five year limitation period to open a case beginning on the date on which the infringement was committed (in the case of one off infringement) or ceased (in the case of continuing infringements), after which the Commission cannot impose a penalty.

18 Meaning that there is still the possibility, albeit small, that further prosecutions of the original cartel offence will be brought in future

19 *Quarmby Construction Company Ltd v OFT* [2011] CAT 11, paragraph 47

20 Given that (1) *Quarmby Construction Company Ltd* concerned the application of Section 36 CA98, which also contains the CMA's powers to fine undertakings for breaching Articles 101 and 102 TFEU; and (2) the Article 25 Procedural Regulation limitation period applies only to the Commission.

21 Section 188A EA02

22 Section 188B EA02

23 Section 188A(1)(a) EA02

24 Section 188A(1)(b) EA02

London Gazette, Belfast Gazette or Edinburgh Gazette[25], nor where the arrangements are part of a legal requirement[26].

2.2.7 Two out of the three defences to the new cartel offence also concern information disclosure (the "**Publication Defences**"). It is a defence if the defendant can prove that, at the time of making the arrangements, she did not intend to conceal the nature of the arrangements from (1) customers prior to the customers entering into agreements for the supply of products or services; or (2) the Competition and Markets Authority ("**CMA**"), the UK's main competition authority.

2.2.8 It is also a defence for a defendant to show that she took reasonable steps to ensure that the arrangements in question were disclosed to professional legal advisors for the purposes of obtaining advice about them before making the arrangements or (as the case may be) implementing the arrangements[27] (the "**Legal Advice Defence**"). Notably, it is irrelevant whether or not legal advice was given or (if it was) what that legal advice actually *said*.

2.2.9 Much ink has been spilled on how the Legal Advice Defence effectively allows defendants to write their own "get out of jail free" cards by taking their clearly illegal arrangements to a lawyer (or even by stopping just short of doing so). However, there are practical reasons why the Legal Advice Defence is drafted the way that it is. An employee on the commercial side of a business (i.e. one who would enter into anticompetitive arrangements with competitors) typically has a very limited ability to require her manager to seek professional advice. With respect to the content of the legal advice, in order to introduce the content of the legal advice into evidence, privilege over that legal advice would need to be waived. In the vast majority of cases, this privilege would not be the defendant's to waive, as the advice would have been sought by the defendant's employer. Given that the legal advice would potentially be highly prejudicial to the defendant's employer, it is unlikely that the employer would waive privilege in all circumstances.

2.2.10 The Publication Exemptions, Publication Defences and Legal Advice Defence to the new cartel offence can be read together as having created a bespoke definition of honesty which supplants that of the average reasonable person in the street (defining "honesty" as a lack of concealment or the seeking of legal advice). A defendant is innocent of the new cartel offence if she has not concealed her cartel arrangements, or if she took legal advice on the subject. As noted below[28] there is an apparent lack of awareness of the average reasonable person in the street of the unlawfulness of even the behaviours

25 The EA02 (Publishing of Relevant Information under section 188A) Order 2014 exercising the powers granted to the Secretary of State by section 188(1)(a)(c) EA02

26 Section 188A(3) EA02. The definition of "legal requirement" used is that set out in Paragraph 5 of Schedule 3 CA98 and means a requirement imposed by UK or EU law, or the law of a Member State having legal effect in the UK.

27 Section 188B(3) EA02

28 See paragraph 3.3.2 below

which make up the cartel offence. This being the case, it was unlikely that any defendant would be held to be "dishonest" absent other external factors, such as a company competition compliance programme.

2.2.11 While an agreement is required in order for the cartel offences to exist, the additional requirements, exceptions and defences to each cartel offence make it possible for one individual within a cartel arrangement to have committed a cartel offence while the others did not. For example, in in original cartel offence case CE/9705/12 ("**Precast Concrete Drainage Criminal Investigation**"), the only individual found guilty at the conclusion of the case had signed a competition compliance policy[29]. Signing a compliance policy amounted to a dishonest misrepresentation of his actions to the wider business. Likewise, with respect to the new cartel offence, a participant to a cartel arrangement would be unlikely to involve other cartel members in a decision as to whether or not to seek legal advice (and so make available the Legal Advice Defence).

### 2.3 Relationship between the civil and criminal prohibitions

2.3.1 The cartel offences are largely freestanding of the Chapter I and Article 101 prohibitions. The only reference to the CA98 Chapter I prohibition in the new and original cartel offences relates to the definition of an undertaking (at least two of which must conspire in order for either cartel offence to have occurred). Notably, the behaviours prohibited by the cartel offences are not explicitly tied back to Chapter I or Article 101.

2.3.2 The CMA takes the approach of concluding its criminal cartel investigations prior to taking significant steps in its civil proceedings[30], although the latter cases are often opened prior to the conclusion of the former.

2.3.3 This consecutive (rather than concurrent) approach is likely a result of the failure of the CMA's predecessor, the Office of Fair Trading's ("**OFT**") prosecution in the "**Air Passenger Fuel Surcharge Criminal Investigation**"[31]. The trial collapsed as a result of the late discovery of several thousand documents in the possession of the immunity applicant in the concurrently run "**Air Passenger Fuel Surcharge Civil Investigation**"[32]. The material would have been potentially disclosable to the defendants in the Air Passenger Fuel Surcharge Criminal Investigation but could not be reviewed in

29 Precast Concrete Drainage Criminal Investigation, sentencing hearing 15 September 2017

30 The CMA's civil investigation CE/9691/12 ("**Galvanized Steel Tanks Civil Investigation**") was opened on 27 November 2012, but did not issue a statement of objections until May 2016, long after the sentencing at the conclusion of the original cartel offence investigation in case CE/9623/12 ("**Galvanized Steel Tanks Criminal Investigation**") on 14 September 2015. The final decision in the Galvanized Steel Tanks Civil Investigation was issued on 19 December 2016. The CMA's civil investigation 50299 ("**Precast Concrete Drainage Civil Investigation**") has not issued a statement of objections, the sentencing at the conclusion of the Precast Concrete Drainage Criminal Investigation having taken place on 15 September 2017.

31 *R v George, Crawley, Burns and Burnett* 2008 (unreported)

32 Case CE/7691-06

time to verify this. As a result the OFT offered no evidence, thus ending the criminal trial. Running the civil and criminal case simultaneously increases the chances that a large disclosure of documents will come unexpectedly from the civil side. If the two investigations must be done consecutively, then it makes sense to do the criminal case first, as all the evidence gathered is likely to be usable in the civil case. The same is not true the other way around[33].

### 2.4 Competition authorities and their priorities

2.4.1 The CMA was created by the Enterprise and Regulatory Reform Act 2013 ("**ERRA**"), which established the CMA's main duty as being to "promote competition, both within and outside the United Kingdom, for the benefit of consumers"[34].

2.4.2 This consumer benefit has been interpreted in monetary terms. The CMA has also been set the target by the UK Government of saving the public GBP 10 in direct consumer benefit for every GBP 1 that it spends. The CMA publishes annual impact assessments ("**Impact Assessments**")[35], as mandated by the Performance Management Framework published by the UK Government in 2014[36] (the "**Performance Management Framework**").

2.4.3 The Impact Assessments estimate how much money the CMA has saved consumers. Only direct savings are included (e.g. as a result of an infringement being brought to an end, or an anti-competitive merger being blocked or modified). Indirect savings are not included (e.g. enforcement acting as a deterrent and causing other cartels not to be entered into or to be terminated), despite evidence suggesting that these may be significant[37].

2.4.4 With regard to enforcement, the Performance Management Framework sets five specific strategic goals for the CMA to:

i. "make strong and effective use of all its competition tools across a range of projects";

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33 See paragraph 3.6.3 below

34 Section 25, ERRA

35 The latest Impact Assessment available at the time of writing is for the year ending 31 March 2017

36 CMA Performance Management Framework, January 2014

37 The OFT publication "The impact of competition interventions on compliance and deterrence" (OFT 1391, December 2011) concluded that for the period 2003 – 2011: (1) 28 cartels were deterred for every cartel investigation; (2) 40 other anti-competitive agreements were deterred for every anticompetitive agreement investigated; and (3) 12 abuses of dominance were deterred for every abuse of dominance investigated.

ii. "select and conclude an appropriate mix of cases, including economically complex 'effects' cases and multiparty cartel cases, to maximise impact, end abuse and create a credible deterrent effect across the economy";

iii. "seek to conclude more and swifter cases while maintaining fairness and without this being at the expense of lower financial penalties";

iv. "ensure its decisions are robust to achieve a greater number of successfully concluded cases and investigations compared to the historical record"; and

v. "increase the proportion of successful defences against appeals of its infringement decisions".

2.4.5 The Performance Management Framework therefore adds to the simple consumer savings goals of the CMA by mandating that the CMA pursue a mix of cases which touch on a variety of infringements, while at the same time working faster and more successfully (in terms of having more infringement decisions which survive the appeals process) than the OFT.

2.4.6 The CMA is additionally given a "**Strategic Steer**" by the UK Government, which is a non-binding statement of strategic priorities for outlining the Government's aims for the CMA to which the CMA must have regard[38]. The latest Strategic Steer pins its ideological colours to the mast, opening with a Milton Friedman quote. With respect to enforcement, the Strategic Steer notes that the CMA should "conclude enforcement cases as quickly as possible ensuring that it has the maximum possible positive impact on the welfare of consumers" as well as that it should use "a mix of powers… to detect and punish cartels and other abuses, and deter anti-competitive actions".

2.4.7 Additional goals are set out in the CMA's "**Annual Plans**"[39]. With respect to enforcement, the CMA's latest Annual Plan states that the CMA will take forward "a higher volume of cases, and doing so as efficiently and quickly as possible, without compromising fairness and rigour". The Annual Plan also states that the CMA will continue to "seek disqualification of directors of companies that breach competition law, to ensure unsuitable individuals cannot serve as company directors and in the most serious cases, [the CMA] will pursue criminal prosecutions".

2.4.8 The CMA is not the only UK competition authority capable of enforcing the Chapter I/Article 101 and Chapter 2/Article 102 prohibitions. The Civil Aviation Authority ("**CAA**"), Financial Conduct Authority ("**FCA**"), the Payment Services Regulator ("**PSR**"), Office of Communications ("**Ofcom**"), Office of Gas and Electricity Markets ("**Ofgem**"), Water Services Regulation Authority ("**Ofwat**"), Office of Rail and Road (**"ORR**") and Northern Ireland Authority for Utility Regulation ("**NIAUR**")

38 The latest of these was published in December 2015. Despite a new British Parliament being elected in 2017, an updated Strategic Steer had not been published at the time of writing.

39 The latest of these at the time of writing was for the year commencing 1 April 2018.

all have the power to enforce the Chapter I/Article 101 and Chapter 2/Article 102 prohibitions in the sectors of the UK economy over which they exercise supervision. All these authorities (the "**Sectoral Regulators**")[40], along with the CMA, are members of the UK Competition Network ("**UKCN**"), , which coordinates UK competition law enforcement[41]. The cartel offences are not prosecuted by the Sectoral Regulators. Only three CA98 infringement decisions have been made by the Sectoral Regulators: one each by the CAA, Ofgem and the ORR[42].

2.4.9 Each Sectoral Regulator has its own strategic objectives. Each are bound by a primacy obligation[43], which states that before making certain decisions the Sectoral Regulator must consider whether it may be more appropriate to proceed under CA98 and enforce the Chapter I/Article 101 and/or Chapter 2/Article 102 prohibitions. Where the Sectoral Regulator does consider it to be more appropriate, it must use its competition powers rather than its bespoke regulatory powers.

2.4.10 "Appropriate" is not defined for any of the Sectoral Regulators. The CMA's Regulated Industries: Guidance on concurrent application of competition law to regulated industries[44] suggests that this may occur where the use of competition law powers may be more effective or provide a greater deterrent and precedent effect for the benefit of competition and consumers.[45]

2.4.11 As well as enforcing competition law, the Sectoral Regulators regulate the sectors of the UK economy. As a rule, this regulation is intended to promote competition in the sector, for example through requiring that owners of infrastructure allow access to third parties.

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40 With reference to the enforcement of the Chapter I/Article 101 and Chapter II/Article 102 prohibitions, the Sectoral Regulators have effectively the same powers as the CMA and in nearly all cases Sectoral Regulators adopt the CMA's Guidance when pursuing cases. As a result of this, and the dearth of Sectoral Regulator competition cases, this Report refers almost exclusively to the CMA.

41 While the now-defunct healthcare regulator, Monitor, is said on the UKCN website to have "observer" status, there is no reference to this observer status having been taken up by NHS Improvement, the successor body to Monitor.

42 A complete list of competition cases brought by the Sectoral Regulators since the founding of the UKCN in 2014 is available on https://www.gov.uk/government/publications/competition-act-1998-cases-in-the-sectors-regulated-by-ukcn-members/competition-act-1998-cases-in-the-regulated-sectors (retrieved 6 June 2018). The only infringement decision by a Sectoral Regulator since 2014 (by the CAA for price fixing at Manchester Airport Car Parks) did not result in fines as one undertaking sought and received immunity and the other had no revenue in the relevant market. In 2010, Ofgem fined National Grid £41,600,000 for breaching the Chapter II/Article 102 prohibition, which was reduced to £15,000,000 on appeal. In 2006, the ORR fined EWS £4,100,000 for breaching the Chapter II/Article 102 prohibition.

43 Schedule 14 ERRA amends the legislation affecting the CAA, Ofcom, Ofgem, Ofwat, the ORR and NIAUR to insert this obligation. With regard to the PSR, this is set out at section 62 FSBRA and with regard to the FCA, this is set out at section 234K of the amended Financial Services and Markets Act 2002.

44 CMA10, March 2014

45 Ibid, paragraph 4.3

## 2.5 Ne bis in idem

2.5.1 The principle of ne bis in idem (or "double jeopardy") is recognised in the Concurrency Regulations. The principle is also recognised in the primacy obligation: once their competition powers are used, the Sectoral Regulators are precluded from pursuing enforcement in a given case using their regulatory powers.

2.5.2 Given Section 60 CA98[46], if the English Court were to consider ne bis in idem in hybrid competition and regulatory cases it would note that the European Court of Justice has consistently held that competition rules may apply where sector specific legislation exists[47]. According to the European Court of Justice, the regulatory infringement and the competition infringement are capable of being two separate acts, despite being based on the same facts.

2.5.3 The UKCN members also appear to take this approach. Ne bis in idem has notably not prevented the FCA from pursuing enforcement action for LIBOR manipulation[48] against undertakings under investigation by the Commission for the same behaviour[49] using its regulatory powers. Notably, the FCA's fining decisions do not take into account the prospect of a fine for the same behaviour being imposed by the Commission for a breach of Article 101[50]. Additionally, there has been no suggestion that criminal cartel proceedings by the CMA against the director of an undertaking should prevent the CMA from pursuing competition enforcement against the undertaking itself.

2.5.4 Double jeopardy is also relevant for the setting of fine[51].

## 2.6 Sanctions against undertakings

2.6.1 As with Article 101 and 102 TFEU, the maximum penalty for a breach of the Chapters I and II Prohibitions is a fine of up to 10% of an undertaking's worldwide turnover. This is not set by the CA98, which provides for the maximum penalty to be set by the CMA in the form of guidance[52]. The

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46 See paragraph 2.1.2 above

47 Joined Cases C-359/95 and C-379/95 P *Commission and France vs. Ladroke Racing*, paragraph 34; Case T-228/97 *Irish Sugar vs. Commission* [1999], paragraph 130; Judgment of the General Court of 30 March 2000 in Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali* [2000], paragraph 59

48 For the FCA's benchmark manipulation fines, including LIBOR, see https://www.fca.org.uk/markets/benchmarks/enforcement (retrieved 6 June 2018)

49 Case 39914: Euro Interest Rate Derivatives

50 See for example the Final Notice for Deutsche Bank dated 23 April 2015

51 See paragraph 2.6.6 below

52 Section 38(1) CA98

CMA's "**Fining Guidelines**"[53] were recently updated following a consultation process. As with the Commission's competition regime, the CMA's fines are purposefully high in order to encourage leniency (among other things), which is rewarded by immunity and reductions from fines as well as immunity for individuals[54].

2.6.2 As with the Commission's own Guidelines, the Fining Guidelines allow for fines based on turnover. The previous version of the Fining Guidelines was used by the CAA to calculate the fine in the only fining decision reached by a Sectoral Regulator[55].

2.6.3 The Fining Guidelines adopt a six step approach:

i. A starting point is calculated having regard to the seriousness of the infringement and relevant turnover of the undertaking (up to 30% in the most serious cases[56]);

ii. The starting point is adjusted for duration, with duration being used as a multiplier;

iii. The resulting figure is adjusted up and down in relation to various aggravating and mitigating factors;

iv. Further adjustment to the figure arrived at from step three is made to take into account deterrence and proportionality;

v. Further adjustment to the figure arrived at from step four is made if necessary to take into account the 10% worldwide turnover cap[57] and to avoid double jeopardy; and

vi. Further adjustment to the figure arrived at from step five is made to take into account leniency and settlement discounts and/or approval of a voluntary redress scheme[58].

2.6.4 Unlike in most jurisdictions, implementing a competition compliance programme and publicly committing to it following the infringement is a mitigating factor can be rewarded with up to a 10%

53 CMA73, 18 April 2018

54 OFT1495, July 2013 is the OFT's detailed guidance on its principles and process in leniency applications, which has since been adopted by the CMA.

55 See footnote 42

56 Fining Guidelines, paragraph 2.4

57 With respect to trade associations, the 10% worldwide turnover cap applies to the sum of the worldwide turnover of each member of the association of undertakings active on the market affected by the infringement. See paragraph 2.2.7 of the Fining Guidelines.

58 The voluntary redress scheme is a new addition to the Fining Guidelines. See further paragraph 2.10.3

reduction from the fine[59]. The mere introduction of such a programme is not sufficient; rather a clear and unambiguous commitment must be made to achieve competition law compliance from the top down. Risk identification, risk assessment, risk mitigation and review activities may all be necessary to secure the 10% discount. Only in exceptional circumstances (for example where compliance activities are used to conceal or facilitate an infringement or to mislead the CMA) do the Fining Guidelines state that compliance activities will be treated as an aggravating factor.

2.6.5 Recidivism is taken into account at stage iii, with the CMA Guidance stating that recidivism may result in the amount reached following the application of stages i and ii being increased by 100% as a result. Recidivism is defined in the CMA Guidance[60] as the undertaking continuing or repeating the same or a similar infringement following a decision by the Commission, the CMA or a Sectoral Regulator that the conduct infringed the Chapter I/Article 101 and Chapter 2/Article 102 prohibitions. It does not, therefore, apply in situations where an undertaking's involvement in several infringements is uncovered at the same time.

2.6.6 At stage v, the CMA may consider reducing a fine to take into account a fine imposed by a regulator for the same act (as the Commission did in its abuse of dominance decision fining Telekomunikacja Polska for an abuse of dominance).[61]

2.6.7 This fine can only be imposed against an undertaking, not an individual[62]. Additionally, the undertaking which has been fined is prevented through the maxim *ex turpi causa non oritur actio*[63] from retrieving fines imposed by a competition authority (nor, by implication, competition damages) from the individual who implemented or failed to prevent a breach of competition law.

2.6.8 With regard the trade associations, the CMA has taken a very different approach in two recent cases. In the Eye Surgeons Case[64], the CMA took the relevant turnover of the trade association's members in order to calculate the starting point at stage i[65]. This resulted in a fine for the trade association of £382,500. In the Modelling Sector Case, the CMA did not take into account members' turnover in

59 Fining Guidelines, footnote 33. A 5% discount for a compliance programme was awarded in the CMA's decision in Case CE/9857-14,10 May 2016 (Bathroom Fittings) and a 10% discount was awarded in the CMA's decision in Case CE/9784-13, 20 August 2015 (Eye Surgeons)

60 At footnote 30

61 Decision in Case 39.525, paragraph 919

62 Unless the undertaking is the individual, e.g. a sole trader.

63 "A claimant may not recover for damage which is the consequence of her own criminal act": see *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, paragraph 27.

64 Case CE/9784-13, 20 August 2015 (Eye Surgeons)

65 Decision in case CE/9784-13, from paragraph 5.32

calculating the starting point for the trade association. As a result the fine was zero until stage iv (deterrence and proportionality) was reached. At this point, a small penalty of £2,500 was imposed on the trade association which was considered "appropriate and proportionate"[66]. The reason for the different approach may have been partly related to the number of members in the trade association. In the Eye Surgeons Case, the trade association in question had hundreds of members, meaning that issuing small fines against each member would have been extremely complex. With respect to the Modelling Sector Case, there were relatively few members of the association, meaning that different fines could be effectively calculated. Also relevant may have been the ease with which each trade association (and by extension, its members) could escape any fine imposed by going in to liquidation.

2.6.9 With respect to a trade association requiring its members to contribute to the payment of a fine, unless they are a joint addressee of the fining decision with respect to the fine on the trade association, it is difficult to see how they might legally claim a contribution from members using a mechanism outside their normal funding arrangements. *Ex turpi causa non oritur action* would prevent a civil claim from being launched by the trade association, as it would be based on that trade association's own unlawful activity[67].

## 2.7 Sanctions against individuals

2.7.1 Both cartel offences are what are known as "either way" offences, in that they can be tried summarily in the Magistrate's Court (which does not have a jury) or on indictment in the Crown Court (which does have a jury). On summary conviction, the cartel offences are punishable by imprisonment of up to six months, an unlimited fine[68], or both[69]. On conviction on indictment, the cartel offences are punishable by imprisonment of up to five years, an unlimited fine, or both[70].

2.7.2 In England and Wales, all criminal cases (even those which can only be tried on indictment) begin in the Magistrate's Court, if only for the initial hearing. The vast majority of criminal cases (including cases involving either way offences) remain in the Magistrate's Court (with transfer to the Crown Court occasionally taking place at the election of either the defendant or prosecution).

66 For example, see the decision in Case CE/9859-14, 16 December 2016 (Modelling Sector), paragraphs 5.91 and 5.101

67 See paragraph 2.6.7

68 As with all other unlimited fines referred to in this Report which may be imposed upon summary conviction, the legislation refers not to an unlimited fine but to the "statutory maximum". The statutory maximum is now unlimited (section 85 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012)

69 Section 190(1)(b) EA02

70 Section 190(1)(a) EA02

2.7.3 However, all prosecutions of the original cartel offences were sent to the Crown Court for trial. The CMA's own Guidance on Cartel Offence Prosecution[71] is silent on considerations of when the cartel offences should be tried summarily (in the Magistrate's Court) or on indictment (in the Crown Court in front of a jury). The Sentencing Council's Allocation Guidelines (which apply to all prosecutions) states that all offences should be tried summarily unless (i) the outcome would clearly be a sentence in excess of the Court's powers or (ii) for reasons of "unusual legal, procedural or factual complexity". Only one trial of the original cartel offence (the "**Marine Hose Criminal Investigation**"[72]) resulted in a sentence in excess of the maximum sentence available on indictment[73], suggesting that the complexity of cases is a key driver in why all cartel offences cases thus far have been tried in the Crown Court.

2.7.4 There are no sentencing guidelines for the cartel offence, although the appeal against sentencing in the Marine Hose Criminal Investigation[74], did list several factors[75] which it said were non-exhaustive but "plainly relevant". The ruling did not indicate how each factor should be weighed against the others.

2.7.5 Upon conviction of any offence in the Crown Court, the Court must proceed to a confiscation hearing where it believes it appropriate to do so, or upon the request of the prosecutor[76]. As the name suggests a confiscation order is designed to confiscate from the defendant the gains which she has made as a result of her criminal activity. The presumptions related to whether a defendant's property or expenditure has come about as a result of a defendant's criminal conduct depend on whether or not the defendant has a "criminal lifestyle" or not[77]. Given that a defendant who commits an offence over at least six months and obtains a benefit of at least GBP 5,000 is regarded to have a criminal lifestyle, it is very possible (given the long term nature of most cartels before discovery) that a criminal cartelist would be found to have had a criminal lifestyle.

2.7.6 Criminal cartelists who do not own the businesses on whose behalf they are engaging in cartel activity have only indirect gains from the cartel activity (unless a large proportion of their job functions, and therefore their salary, directly relates to their cartel work). These include performance-related bonuses

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71 CMA9, March 2014 – this Guidance is a summary of the cartel offence and codes used by English and Scottish prosecutors when deciding to bring a prosecution. There is nothing contained within it which cannot be found elsewhere.

72 *R v Whittle, Brammar and Allison* (unreported)

73 Sentences ranging from 2.5 to 3 years were imposed, these were reduced to 20 months to 2.5 years on appeal

74 *R v Whittle, Allison and Brammar* [2008] EWCA Crim 2560, paragraph 34

75 Namely the gravity and duration of the offence; the degree of culpability of the defendant in implementing and enforcing the cartel; whether the cartel was contrary to the defendant's company compliance manual; and any mitigating factors such as personal circumstances or duress

76 Section 6, Proceeds of Crime Act 2002 ("**POCA**")

77 Sections 10 and 75, POCA

and additional share dividends (as a result of the cartelised company being more profitable by virtue of the cartel), which are potentially available for confiscation. While this does not preclude a confiscation order, it does make attribution more difficult. Confiscation proceedings have only been brought once in cartel offences cases: in the Marine Hose Criminal Cartel Case. Two of the three defendants were ordered to pay GBP 366,354 and GBP 649,636 respectively or face a further term of imprisonment[78].

2.7.7 Where a person is a director of a company which is part of an undertaking which commits a breach of competition law, the Court may make a director disqualification order ("**DDO**") disqualifying that person as a director for up to 15 years where the director's conduct makes her "unfit" to be concerned in the management of the company[79]. "Unfit" is not defined, but rather left to the Court to determine. The relevant legislation does however list various matters which the Court must consider and matters which it may consider when making its determination (such as the directors' involvement in or knowledge of the breach). A "breach of competition law" is defined, but by reference to the civil prohibitions on anticompetitive behaviour in effect in UK law (i.e. Chapters I and II of the CA98 and Articles 101 and 102 TFEU) and not the cartel offences. As an alternative to being struck off by Court order, a director may agree to give an undertaking not to be a director (or take other specified action regarding the formation and management of a company) for up to 15 years[80] (a director disqualification undertaking ("**DDU**")). A person who has been disqualified, whether through a DDO or a DDU is guilty of an offence punishable by imprisonment of up to two years if she acts as a director[81] and may be held personally responsible for the company's debts[82]. The CMA has stepped up director disqualification in recent years, but has not updated the original guidance issued by the OFT[83].

2.7.8 Additionally, regulatory bodies with the power to fine and ban members/authorised persons may take action upon being presented with evidence of an individual's involvement in cartel activity. For example, on 5 March 2018, the FCA announced that it had fined a trader for improperly influencing

78 See https://www.gov.uk/cma-cases/marine-hose-criminal-cartel-investigation (retrieved 6 June 2018)

79 Section 9A Company Directors Disqualification Act (as amended)

80 *Ibid*, Section 9B

81 *Ibid*, Section 13

82 *Ibid*, Section 15

83 OFT510, 1 June 2010. Note that the CMA announced on 4 June 2018 that it would be revising OFT510. At the same time as this announcement, the CMA deleted a paragraph from OFT510 in recognition of the fact that, in order for an appeal against a DDO to be heard in the CAT the same time as an appeal against an infringement decision or penalty, disqualification proceedings would need to start earlier than provided for in the now-deleted paragraph of OFT510.

LIBOR submissions, as well as banning him from performing any function in related to any regulated financial activity[84].

## 2.8 The relationship between sanctions against individuals and undertakings

2.8.1 The Galvanized Steel Tanks Criminal Investigation resulted in a guilty verdict for an employee of one of the three undertakings involved. The decision in the Galvanized Steel Tanks Civil Investigation is therefore a good demonstration of the effect of an original cartel offence investigation and conviction on the subsequent Chapter I/Article 101 TFEU fining decision. Notably, the undertaking for which the convicted cartelist worked was treated no differently to the other two undertakings (whose employees had been found not guilty having convinced the jury which tried them that they had not behaved dishonestly).

2.8.2 In setting the starting point[85], the presence of price fixing, bid rigging and market sharing by way of customer allocation (all behaviours caught by the cartel offences[86]) meant that the CMA chose the highest point (30% of relevant turnover) allowed by the Fining Guidelines for all three undertakings.

2.8.3 The involvement of senior employees in the infringement was held to be an aggravating factor, increasing the financial penalty at step 3[87] by 15%[88]. Notably, the 15% uplift was applied equally to all undertakings involved in the infringement: the fact that only one undertaking had employed a person found guilty of the original cartel offence does not appear to have been regarded as an aggravating or mitigating factor.

2.8.4 The dishonesty of the employee of one undertaking and the honesty of the employees of the other two undertakings (as found by the original cartel offence trials) had no bearing on the eventual fine. This is consistent with the more general principle contained within the European Court of Justice's rulings[89] that intent is not a necessary factor in determining whether an agreement between undertakings is restrictive of competition[90].

2.8.5 The decision in the Galvanized Steel Tanks Civil Investigation shows that there is no direct relationship between the imposition of a sanction on an employee (or its absence) and the imposition of a sanction

84 See press release dated 5 March 2018 (https://www.fca.org.uk/news/press-releases/fca-fines-and-bans-former-deutsche-bank-trader-guillaume-adolph (retrieved 6 June 2018))

85 See paragraph 2.6.3i above

86 See paragraph 2.2.2 above

87 See paragraph 2.6.3iii above

88 Galvanized Steel Tanks Civil Investigation decision, paragraph 5.30

89 Read across into the Chapter I CA98 case law by virtue of Section 60 CA98

90 *Cartes Bancaires v Commission* Case C-67/13P, paragraph 54

on that employee's undertaking for anticompetitive behaviour. Indirectly, only the more severe anticompetitive agreements are caught by the cartel offences, meaning that the starting point for fines will be set at a higher proportion of turnover in cases where criminal sanctions are a possibility.

### 2.9 Additional sanctions for non-cooperation

2.9.1 Like the Commission's competition enforcement regime on which it is based, the CMA's competition law regime contains penalties for non-cooperation during its investigations, which can apply to individuals and to undertakings[91]. While the CMA has previously issued a fine against an undertaking for non-cooperation[92], it has not sanctioned individuals.

2.9.2 Providing false or materially misleading information to the CMA in the course of the CMA's enforcement of its CA98 investigations, either knowingly or recklessly, is an offence punishable by an unlimited fine on summary conviction and an unlimited fine and two years' imprisonment if convicted on indictment[93]. This offence applies to persons providing the CMA directly with the false or materially misleading information and to persons providing the information to another person knowing that the information will be provided to the CMA[94]. Destroying or falsifying documents requested by the CMA under its CA98 powers is also punishable by the same sanctions[95], as is the obstruction of an officer exercising the CMA's powers of entry to a premises with a warrant[96]. Where the CMA has not used a warrant, the penalty is merely an unlimited fine[97]. Officers of a company are also guilty of these offences if it is shown that they consented or connived in the committal of the offence, or if the offence is attributable to the officer's neglect[98].

2.9.3 The CMA can also fine a person (including a legal person) for a failure to comply with a requirement imposed under its CA98 powers to answer questions, provide information or allow entry to premises. The penalty can be fixed, calculated by reference to a daily rate or a combination of the two[99]. The

91 Additional powers exist under the EA02 with respect to penalties for non-cooperation/providing misleading information in relation to the CMA's merger control and market investigation inquiries

92 See CMA decision of 12 April 2016 in Case CE/9742-13 fining Pfizer for failing to provide information

93 See paragraph 2.7.1 for an explanation of the difference between summary conviction and conviction on indictment

94 Section 44 CA98

95 Section 43 CA98

96 Section 42 CA98

97 Section 42 CA98

98 Section 72 CA98

99 Section 40A CA98

CMA's approach is set out in further detail in its Statement of Policy on its approach to Administrative Penalties[100].

2.9.4 With respect to the CMA's cartel investigations, the picture is similar. The CMA has powers to enter premises under a warrant and gather information as part of its investigations into the cartel offence[101]. It also has the power to require the person under investigation or any other person who it believes has relevant information to answer questions or provide information (including producing documents and providing explanations of those documents)[102]. Failing to comply with a requirement imposed by the CMA under these powers without reasonable excuse is an offence punishable by imprisonment of up to six months and a fine not exceeding level 5[103] on the standard scale[104]. Knowingly or recklessly making a misleading statement in response to the CMA while purportedly complying with these requirements is an offence[105] punishable by imprisonment for up to six months and an unlimited fine on summary conviction and imprisonment for up to two years and an unlimited fine if convicted on indictment. Intentionally obstructing a person exercising powers under a S.194 EA02 warrant is guilty of an offence punishable by an unlimited fine upon summary conviction and imprisonment of up to two years and an unlimited fine upon conviction on indictment. As with Commission investigations, individuals may refuse to answer where the answer may be self-incriminating.

2.9.5 The most serious ancillary penalties in relation to the cartel offences are for the falsification, destruction, concealment or disposal of documents where a person knows or suspects that a cartel offence investigation is or is likely to be carried out[106]. Here the penalties are up to six months' imprisonment and an unlimited fine upon summary conviction and up to five years' imprisonment and an unlimited fine upon conviction on indictment.

### 2.10 Competition damages and their relationship to the penalties regime

2.10.1 Competition damages are available in the English Courts, with the Claimant's cause of action typically being a breach of statutory duty[107]. The UK implemented Directive 2014/104/EU (the "**Antitrust Damages Directive**") through passing the Claims in respect of Loss or Damage arising from Competition Infringements (CA98 1998 and Other Enactments (Amendment)) Regulations 2017 (the

100 CMA4, January 2014

101 Section 194 EA02

102 Section 193 EA02

103 Currently GBP 5,000

104 Section 201 EA02

105 Section 201(2) EA02

106 Section 201(5) EA02

107 *Garden Court Foods v Milk Marketing Board* [1984] AC 130

"**Damages Regulations**"). The Damages Regulations put into English law provisions in the Antitrust Damages Directive which had (until then) not been explicit in English law, such as the presumption that cartels cause harm[108].

2.10.2 Exemplary damages (i.e. damages in excess of a Claimant's actual losses) are precluded by the Damages Regulations[109] but only with regard to claims related competition infringements which began on or after 8 March 2017[110]. For competition infringements beginning before this date, exemplary damages are available in cases where (1) the infringement has not been punished by a fine by a competition authority; and (2) the defendant showed a "cynical disregard" for the claimant's rights[111]. Given the high bar, exemplary damages have only been awarded once by the English Court[112], and even then the damages awarded were a small fraction of the sums sought[113].

2.10.3 Following the recent adoption of the CMA's Fining Guidelines on 18 April 2018, undertakings fined by the CMA have the opportunity to reduce their fine by entering into voluntary redress schemes[114]. The CMA has published Guidance on the approval of voluntary redress schemes for infringements of competition law[115]. An applicant may submit a voluntary redress scheme to the CMA or a Sectoral Regulator for approval[116]. The voluntary redress scheme, once approved, allows victims of the competition infringement to make claims through the scheme rather than through the Courts, which it is hoped will increase the availability of follow on damages.

2.10.4 Interestingly, the maxim *ex turpi causa non oritur actio*, which prevents undertakings from claiming damages from their competition law-infringing employees, would not apply to a competition damages claimant. This means that competition damages are, theoretically, available from the individuals involved in a competition law infringement. This Reporter is unaware of any attempt by a cartel victim[117] to bring a damages action against an individual in the English Court for a breach of competition law. Such an action would only be worthwhile if (1) a claim against the undertaking on whose behalf the individual had been acting was impossible (e.g. due to the subsequent liquidation of

108 Part 4, Damages Regulations

109 Paragraph 36 Damages Regulations

110 Paragraph 42 Damages Regulations

111 *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2010] CAT 31

112 Although this Reporter is aware of at least one other case where they were paid as part of a settlement agreement

113 *Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19

114 See paragraph 2.6.3 above

115 CMA40, 14 August 2015

116 Section 49C CA98

117 Rather than the undertaking fined for the cartel activity: see *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472

the undertaking's constituent legal entities); (2) a claim against any other undertakings involved in the infringement who could be held joint and severally liable was also impossible; and (3) the individual had sufficient resources to pay the damages claimed. An individual who resides in the UK may also be useful as an anchor defendant, in the event that no other potential defendants can be found.

2.10.5 With respect to (3), the individual may have sufficient resources to pay the damages claimed by virtue of her Directors and Officers Liability Insurance ("**D&O**"). While D&O policies in the UK exclude from cover claims resulting from the insured's dishonest or criminal behaviour (meaning that any liability resulting from the commission of the cartel offences would be excluded), they can sometimes make limited exceptions in relation to civil penalties. It is therefore technically possible for a D&O policy to pay out for competition damages for an individual's non-criminal but still unlawfully anticompetitive acts.

2.10.6 The statutory duties imposed by the TFEU and CA98 competition law prohibitions apply to *undertakings* and not to individuals. It is therefore not certain that a Court would allow a claim against an individual (who was not an undertaking) for her involvement in a breach of these prohibitions. The English Courts have proven reluctant to expand the scope of competition damages claims beyond those expressly permitted.[118]

**2.11 Parental liability**

2.11.1 In order to function, competition law must pierce the corporate veil. For example, it is clear that company pricing and marketing strategies dictated at the Group level are not regarded as unlawful coordination between entities which should be acting independently. It makes sense and seems appropriate that the fines imposed by competition law also pierce the corporate veil and look at Group, rather than the individual infringing entities.

2.11.2 Given that the Chapter I/Chapter II prohibitions are effectively identical to the Article 101/102 prohibitions aside from the territory in which the prohibition applies, it is unsurprising that the UK competition authorities adopt the same approach with regard to the concept of "undertaking" as the Commission.

2.11.3 A parent company and its subsidiaries will be treated as a single undertaking where the subsidiaries lack economic independence[119]. UK competition law also considers the exercise of decisive influence

118 For example, in *Air Canada & Ors v Emerald Supplies Limited & Ors* [2015] EWCA Civ 1024, the Court of Appeal refused to allow the claimants to expand the scope of the claim to include conduct which took place outside the EU using the tort of conspiracy and the tort of interference.

119 See OFT Guidance on Enforcement (OFT407), paragraph 5.41. This Guidance has been adopted by the CMA.

in relation to wholly owned companies in the same way as the European Commission and courts, applying the test set out in *Akzo Nobel NV v Commission*[120] in domestic cases[121].

2.11.4 A good illustration of the UK competition authorities' practice can be seen in the OFT's decision in 2009 on bid rigging in the construction industry[122]. The OFT took the view that companies within the same corporate group that formed a single undertaking were jointly and severally liable for the infringements. In that decision, the OFT states:

"In this regard, it is important to note that the effective enforcement of competition law depends on ensuring that all legal entities with responsibility for the commission of an infringement are susceptible to the relevant sanctions for that infringement. This includes (current and former) parent companies who, although not directly involved in the infringing acts, could have influenced the policies and conduct of their subsidiaries to prevent such infringements but failed to do so."

2.11.5 The decision makes clear that:

i. Like the Commission, the CMA will hold that the exercise of decisive influence can be presumed where a subsidiary is wholly owned by its parent, whether directly or indirectly. No further evidence is required.

ii. The CMA does not need to establish that the parent did *in fact* exert decisive influence, where it is able to presume that the parent held decisive influence.

iii. The presumption will be further supported where additional indicia of decisive influence exist, for example, the use of the same commercial logo or name, a parent being active on the same or adjacent markets to the subsidiary, direct instructions being given by a parent to a subsidiary, or the two entities having shared directors[123].

iv. Assertions by parties that their parent company is a holding company only, or that the subsidiary has its own management board, or that the parent is not involved in the subsidiary's day to day management are not in themselves sufficient to rebut the presumption. A parent must adduce evidence relating to the economic and legal organisational links between it and the subsidiary.

120 Case C-97/08 P

121 E.g. in *Durkan Holdings and Others v Office of Fair Trading* [2011] CAT 6

122 Decision of 21 September 2009 in case CE/4327-04

123 See, for example, *Sepia Logistics v OFT* [2007] CAT 13, in which the Competition Appeal Tribunal ("**CAT**") confirmed the approach taken by the OFT in its decision on aluminium spacing bars. The OFT did not rely on the bare presumption of control

v. Common directorships can be relied on to indicate decisive influence even if the directors are not implicated in the infringements.

2.11.6 As with Commission decisions, once the CMA reaches a decision, it must address that decision to one or more legal persons. The CMA's practice has been to address its decisions to each of the top company in the undertaking and (if different) the companies in the undertaking which implemented the anti-competitive arrangements, holding them jointly and severally liable for the infringement.

## 3. ARE PRESENT SANCTIONS EFFICIENT / SUFFICIENT?

### 3.1 Largest sanctions

3.1.1 The CMA's largest fines for the period 2013 – 2017 per infringement decision. in descending order of size are as follows:

**Table 1: CMA's Largest Fines per Infringement Decision 2013 - 2017**

| Case | Date of Decision | Total Fine | Infringement |
|---|---|---|---|
| Phenytoin sodium capsules | 7 December 2016 | GBP 89,361,423 | Abuse of dominance (excessive pricing) |
| Paroxetine | 12 February 2016 | GBP 44,990,421 | Anti-competitive agreements (pay for delay) |
| Mercedes-Benz: distribution of commercial vehicles (trucks and vans) | 27 March 2013 | GBP 2,857,369 | Anti-competitive agreements (hub and spoke) |
| Light fittings sector | 3 May 2017 | GBP 2,763,491 | Anti-competitive agreements (resale price maintenance) |
| Supply of galvanised steel tanks for water storage | 19 December 2016 | GBP 2,625,309 | Cartel |

but on the fact that the ultimate parent exercised actual control through an individual director of both the parent and subsidiary and specifically through her direct involvement in the infringement (including participation in relevant meeting).

3.1.2 The CMA's five highest fines imposed on individual undertakings are as follows:

**Table 2: CMA's Largest Fines per Undertaking 2013 - 2017**

| Case | Date of Decision | Fine and Addressee | Infringement |
|---|---|---|---|
| Phenytoin sodium capsules | 7 December 2016 | Pfizer fined GBP 84,196,998[124] | Abuse of dominance (excessive pricing) |
| Paroxetine | 12 February 2016 | GSK fined GBP 37,606,275 | Anti-competitive agreements (pay for delay) |
| | | GUK-Merck fined GBP 5,841,286 | |
| Light fittings sector | 3 May 2017 | National Lighting Company fined GBP 2,608,137 | Anti-competitive agreements (resale price maintenance) |
| Commercial catering equipment sector | 24 May 2016 | ITW Limited fined GBP 2,298,820 | Anti-competitive agreements (resale price maintenance) |

3.1.3 The Courts only imposed sentences for the original cartel offence during the period 2013 – 2017. Note that the only other sentences for the cartel offences ever imposed were in the Marine Hose Criminal Investigation[125].

**Table 3: CMA Cartel Offence Convictions 2013 - 2017**

| Case | Date of Sentencing | Fine and Addressee | Infringement |
|---|---|---|---|
| Precast concrete | 15 September 2017 | 2 years' imprisonment, suspended for two | Cartel offence |

124 Note that the CAT overturned this fine on 7 June 2018 in *Flynn Pharma Limited and Flynn Pharma Holdings Limited v Competition and Markets Authority and Pfizer Inc and Pfizer Limited v Competition and Markets Authority,* [2018] CAT 11

125 The circumstances of the Marine Hose Criminal Case were very different to the other original cartel offence cases brought, see paragraph 3.6.6 below.

| | | | |
|---|---|---|---|
| drainage (1 person) | | years<br><br>Six month 6pm – 6am curfew order | |
| Galvanized Steel Tanks (1 person) | 14 September 2015 | 6 months' imprisonment, suspended for 12 months<br><br>120 hours' community service | Cartel offence |

3.1.4 The following two director disqualifications were imposed during the period 2013 – 2017[126]

**Table 4: Competition Director Disqualifications 2013 - 2017**

| **Case** | **Date of Disqualification** | **Duration and method** | **Infringement** |
|---|---|---|---|
| Precast concrete drainage (1 person) | 15 September 2017 | DDO for 7 years | Cartel offence |
| Online sales of posters and frames | 30 November 2016 | DDU for 5 years | Anti-competitive agreement (price fixing) |

3.1.5 No fines have been imposed on individuals during the period 2013 – 2017. Note that the only financial penalty imposed on an individual for anticompetitive agreements appears to have been the confiscation proceedings initiated against defendants in the Marine Hose Criminal Investigation[127].

### 3.2 Does competition enforcement pass the CMA's 10:1 test?

126 Note that on 10 April 2018, the CMA obtained DDUs from two former directors of estate agents which had previously been fined for fixing the minimum commission rate which they would offer. See https://www.gov.uk/cma-cases/residential-estate-agency-services-in-the-burnham-on-sea-area-director-disqualification (retrieved 6 June 2018)

127 See paragraph 2.7.6 above

3.2.1 The logical first step in determining whether or not the present sanctions are efficient or sufficient is to see whether the CMA's own targets are being met with respect to competition law enforcement. As noted in paragraph 2.4.2, the CMA has been set a monetary target: to create a 10:1 savings/cost ratio with respect to its work. This ratio relates to the whole of the CMA's work: its latest impact assessment[128] shows that the CMA exceeded its 10:1 public savings/cost ratio target by achieving benefits worth an estimated GBP 1,228m per year against a GBP 66m budget: a benefit/cost ratio of 18.6:1 for 2014-2017[129]. However, less than 15% of this saving (GBP 138.2m) was attributed to the CMA's competition enforcement work. This raises the question: does the CMA's competition enforcement work on its own achieve the 10:1 target?

3.2.2 The answer is difficult to determine from the available figures. The CMA's accounts for its latest financial year[130] show expenditure on enforcement of GBP 16.1m[131]. However this spending also includes consumer enforcement, meaning that the GBP 59.4m of reported savings in consumer enforcement must also be included to create an estimated saving to the public purse of GBP 197.6m and a 12.3:1 benefit/cost ratio. In reality, the benefit ratio is likely to be much lower, given that CMA-wide costs, such as the cost of the CMA's premises and IT services are accounted for separately and not apportioned between the CMA's different segments.

3.2.3 Applying the same methodology to the 2015/16 and 2014/15 financial years yields a similar picture, illustrated in the table below:

**Table 5: CMA Enforcement and Consumer Benefit/Cost Ratio**

| **Financial Year** | **Enforcement and Consumer Saving** | **Enforcement and Consumer Cost[132]** | **Benefit/Cost Ratio** |
|---|---|---|---|
| 2016/2017 | GBP 197.6m | GBP 16.1m | 12.3:1 |
| 2015/2016 | GBP 147.7[133] | GBP 17.5 | 8.4:1 |

128 For Financial Year ending 31 March 2016

129 Ibid, Table 1. See paragraph 2.4.2 above for detailed explanation of the CMA's objectives

130 Year ending 31 March 2017

131 See page 132 of the Accounts. Comprises the CMA's total spend on its Cartel & Criminal Group (GBP 6.9m) and the "enforcement" segment of the Competition, Consumer and Markets Group (GBP 9.2m).

132 Figures for Financial Years 2015/2016 and 2014/2015 taken from page 120 of the 2015/2016 Accounts, (2014/2015 figures were restated in these accounts to reflect structural changes made in August 2015)

133 Taken from Table 1 of the CMA's 2015 impact assessment

| | | | |
|---|---|---|---|
| 2014/2015 | GBP 144.2[134] | GBP 13.4 | 10.8:1 |

3.2.4 The above table shows that the CMA's competition and consumer enforcement segments did not, on its own, achieve the 10:1 benefit/cost target in financial year 2016. As mentioned in paragraph 3.2.2 above, certain costs of enforcement are only captured centrally in the CMA's accounts, meaning that the benefit/cost ratio in the table is likely to be overly generous to the CMA. Given how close financial years 2017 and 2015 are to the target, were these fixed costs to be apportioned between the CMA's departments, there is a very real possibility that competition and consumer enforcement did not achieve the 10:1 benefit/cost target on its own in any of the three financial years in which the CMA has been the UK's principal competition regulator.

3.2.5 With respect to the CMA's criminal cartel enforcement (1) these cases took a comparatively long amount of time to investigate, prosecute and conclude; and (2) in the case of the Galvanized Steel Tanks Criminal Investigation, related to a small market (as indicated by the size of the fine at the conclusion of the Galvanized Steel Tanks Civil Investigation). These factors suggest that it is highly unlikely that the CMA's criminal cartel enforcement activities achieve the CMA's central 10:1 benefit/cost target.

3.2.6 While the 10:1 target is for the whole of the CMA's activities and not for an individual segment, the fact that competition and consumer enforcement "lags behind" the CMA as a whole in terms of savings to costs suggests that there may be room for improvement. It is worth noting that the above figures do not include the fines imposed by the CMA in each financial year: GBP 100m in 2016/17, GBP 46m in 2015/16 and GBP 0.7m in 2014/15[135]. The income from fines greatly exceeds the costs of enforcement, making the net cost to the public purse of the CMA's competition and consumer enforcement segments a negative number, suggesting that the 10:1 benefit/cost target may not be appropriate here[136].

### 3.3 Are the British public aware of competition law?

3.3.1 Given the small number of civil enforcement cases undertaken by the CMA and very small number of criminal enforcement cases undertaken, competition law enforcement may only be effective once the wider effect of enforcement is taken into account, i.e. the deterrence and educational effect of such enforcement. Competition law sanctions can be said to be effective if they had a deterrent effect, or

134 Taken from Table 1 of the CMA's 2014 impact assessment

135 CMA 2017 Accounts, page 6

136 Professor Bruce Lyons writes in further detail on the appropriateness of the 10:1 target in a blog post which is available on https://competitionpolicy.wordpress.com/2016/08/05/the-dangerously-distorted-incentives-created-by-the-cmas-performance-target/ (retrieved 6 June 2018)

served to educate businesses in competition law by virtue of enforcement actions being publicised. The CMA's latest Strategic Steer and Annual Plan both mention the importance of increasing awareness of competition law.

3.3.2 With regard to the educative effect of enforcement, in 2015, the CMA commissioned a survey to ascertain British businesses' understanding of competition law[137] (the "**CMA Survey**"). The CMA Survey found poor awareness among businesses. Most damningly, relatively few respondents knew that the behaviours which made up the cartel offences were illegal[138]. Awareness of the penalties was also low: suggesting that the level of fines imposed has not permeated the public consciousness. The CMA Survey found that 66% of respondents answered "don't know" when asked what the penalties were for non-compliance with competition law, although 53% of respondents did know that price fixing could lead to imprisonment[139]. Given the low level of awareness, it is difficult to see how the cartel offences can amount to an effective deterrent.

3.3.3 In 2014, YouGov carried out online surveys in UK, Germany, the USA and Italy[140] ("the **YouGov 2014 Survey**"). The YouGov 2014 Survey recorded that 53% of British respondents knew that price fixing was illegal[141]. An earlier iteration of the survey, taken in 2007 (the "**YouGov 2007 Survey**") found that only 63% of respondents considered price fixing to be dishonest, with 21% saying that it was not dishonest[142].

3.3.4 This being the case, it is questionable whether an English jury[143] could ever find that cartel behaviour would satisfy the first limb of the *Ghosh* test[144] without "aggravating" features such as misrepresentation and deception also being present. Cartelists had previously been successfully prosecuted in such cases for conspiracy to defraud prior to the original cartel offence coming into

137 "UK businesses' understanding of Competition Law", prepared for the CMA by IFF Research and published on 26 March 2015

138 55% of respondents thought it was permissible to agree prices with competitors to avoid losing money; 47% thought it permissible to discuss prospective bids with competitors; 40% thought it permissible to agree to market share. See CMA Survey, paragraph 4.18.

139 CMA Survey, paragraph 4.20.

140 See paper by Andreas Stephan "Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA", CCP Working Paper 15-8 ("**Stephan (2015)**")

141 Stephan (2015), table 6

142 See paper by Andreas Stephan "Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain (2008) 5 Competition Law Review 123" ("**Stephan (2008)**"), Table 14

143 While a majority jury is sometimes permissible for English (and Welsh) jury trials, a majority of 10 - 2 is required, suggesting that at least 83% of the jury must think that a person defending a charge of the original cartel offence was dishonest. Simple majorities are acceptable in Scottish jury trial, meaning that a representative Scottish jury *could* convict a cartelist were an original cartel offence case ever to be tried in Scotland.

144 See paragraph 2.2.3 above

force[145]. This suggests that the original cartel offence was unnecessary in cases where aggravating features to the cartelists' behaviour were present and unworkable in cases where aggravating features were not present.

### 3.4 Do the British public approve of how competition law is enforced?

3.4.1 Another way of assessing the effectiveness of the UK competition sanctions regime is to consider how closely it reflects British public opinion. The YouGov 2014 Survey shows that the British public back fines (77% were in favour) and the availability of follow on damages (72% were in favour) for competition infringements[146]. This suggests that the CMA's civil enforcement regime has widespread public support.

3.4.2 But the YouGov 2014 Survey also suggests that the British public is not supportive of imprisonment as a punishment for the cartel offences, with only 27% being reportedly in favour of imprisonment[147]. This represents an improvement on the 11% found in the YouGov 2007 Survey[148]: however support for imprisonment for cartelists is still very much a minority view.

3.4.3 The YouGov 2014 Survey did report high support for price fixing being a crime (76% were in favour)[149] and that the secrecy of a cartel made it more deserving of punishment (82% agreed with this statement)[150]. Additionally, high levels of British public support were reported for public naming and shaming of individuals (69%) and bans from holding senior managerial positions in business (75%)[151].

3.4.4 This suggests that the results that the CMA has achieved with regard to individual sanctions, i.e. director disqualification, coupled with the non-penal sentences for the cartel offence (with the exception of the special circumstances of the Marine Hose Criminal Investigation[152]); as well as the new cartel offence, with its Publication Exemption and Publication Defences may strike the right balance with public opinion after all.

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145 Examples are cited in *Norris v United States of America* [2008] UKHL 16 at paragraph 19.

146 Stephan (2015), Table 7

147 Stephan (2015), Table 8

148 Stephan (2008), section 3.4

149 Stephan (2015), Section 7

150 Stephan (2015), Table 11

151 Stephan (2015), Table 8

152 The prison sentences imposed in the Marine Hose Criminal Case were such that any lower and the defendants would have been extradited to the US to serve the remainder of the time in a US prison, as per the terms of the defendants' plea agreements with the US authorities. The result of this was that the defendants effectively requested the sentences which they received, despite

### 3.5 Is there sufficient enforcement?

3.5.1 Civil enforcement, rather than criminal enforcement clearly dominates in the UK. In the ten years from 1 January 2008, the CMA closed 52 CA98 cases. Of these, seven were abuse of dominance cases and 45 related to anticompetitive agreements. During the same time period, the CMA closed seven original cartel offence cases. As noted above, there have only ever been two fines for CA98 infringements imposed by Sectoral Regulators.[153]

3.5.2 These figures are considerably lower than comparable NCAs. During the same period, the CMA's German counterpart, the Bundeskartellamt ("**BKA**") closed 90 cartel cases[154]. In 2017 alone, the BKA fined 11 individuals. The YouGov 2014 Survey suggests that German citizens have a much higher awareness of the illegality of price fixing than UK citizens (75% were reported in the YouGov 2014 Survey to be aware that price fixing was illegal)[155] . However, US citizens have a lower awareness that even UK citizens (only 41% of US respondents in the YouGov 2014 Survey were aware price fixing was illegal, compared to 53% of British respondents)[156], which as Stephan (2015) notes, is counterintuitive given the much greater use of criminal antitrust enforcement in the USA. Stephan (2015) also notes that the subject matter of some of the BKA's reported cartel probes in early 2014 (beer, sausages and trains) are likely to have caught the German public's attention and hardened their responses to cartels.

3.5.3 Notably, there has never been a successful contested prosecution of the cartel offence in the United Kingdom. All those convicted of the original cartel offence pled guilty while all those who contested the charge of the original cartel offence at trial have been found not guilty. The new cartel offence remains untested.

3.5.4 There have been extradition cases where British residents have been extradited from the UK to the USA to answer charges of criminal cartel activity over there. There has not, however, been any equivalent extradition to the UK from the USA (or anywhere else) for the cartel offence. Any extraditing third country is likely to have equivalent provisions to the UK Extradition Act 2003 limiting extradition to those circumstances where the conduct for which the suspect is being sought must be

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their appearing excessive when set against the sentences subsequently imposed for the original cartel offence. As such, this case should be regarded as an outlier. See *R v Whittle, Allison and Brammar* [2008] EWCA Crim 2560, paragraph 27

153 See paragraph 2.4.8 above

154 See the BKA's 2016 annual report and case database. The BKA uses the term "cartel" to define any breach of the prohibition on anticompetitive agreements.

155 Stephan (2015), Table 6

156 Stephan (2015), Table 6

unlawful in the extraditing country[157]. As a result, whether or not a suspect is tried under UK law or under domestic law appears to matter not to liability so much as to sentencing.

3.5.5 The need for the CMA to do more cases and conclude those cases more swiftly is recognised by its latest Strategic Steer and Annual Plan[158]. The primacy obligation[159] is an attempt by the UK Government to ensure that the Sectoral Regulators make more use of their competition powers, recognition of the fact that these powers have been underused.

### 3.6 Are the right cases attracting the most serious sanctions?

3.6.1 The Procedural Regulation only allows for the exchange of information between the members of the ECN for the purposes of applying the Article 101 and 102 TFEU provisions[160]. However, the receiving authority can only use the information in evidence to imprison defendants where the law of the transmitting authority foresees this in relation to violations of Article 101 or Article 102 TFEU. With respect to other sanctions such as DDOs/DDUs, the national law of transmitting authority must either (1) have foreseen the same sanctions; and/or (2) the evidence must have been collected in a manner which respects the same level of protection for the defendant as is provided by the national law of the receiving authority.

3.6.2 The result of this is that information gathered and transmitted by the Commission cannot be used as evidence to prosecute the cartel offences because (1) the CMA is barred by the Procedural Regulation from using any evidence transmitted to it by the Commission to prosecute the cartel offences; and (2) the Commission's evidence gathering methods (e.g. through leniency statements) are unlikely to be regarded as sufficiently fair for the evidence gathered to be admissible in criminal proceedings.

3.6.3 There is no prima facie bar on the use of evidence gathered in civil proceedings being used in UK criminal proceedings, provided that the evidence has been gathered in a manner compatible with the defendants' rights of defence. Section 78 of the Police and Criminal Evidence Act 1984 ("**PACE**") allows the Court to refuse to admit evidence if it appears, having regard to all the circumstances (including the circumstances in which the evidence was obtained), that to admit the evidence would have such adverse effect on the fairness of the proceedings that the Court ought not to admit it. There is no general guidance on the application of this principle[161], but it has seen its greatest use in rendering

157 For example at section 64(3)(b) of the Act

158 See paragraphs 2.4.6 and 2.4.7 above

159 See paragraph 2.4.9 above

160 Article 12, Procedural Regulation

161 See paragraph 15-524 Archbold Criminal Pleading Evidence and Practice 2018 Ed

confessions inadmissible[162]. Evidence from a leniency statement, which commonly makes up the bulk of a statement of objections but which is heavily influenced by the offer of immunity or heavy discounts from fines is therefore likely to be excluded by a Court during a criminal trial. An argument could also be made for the exclusion on fairness grounds of even original documents provided as part of the leniency process, on the grounds that the provision of these document by the leniency applicant will, inevitably, have been done selectively so to prove the applicant's case.

3.6.4 Wouter Wils points out that the exclusion of evidence transmitted to NCAs from criminal proceedings does not prevent the *intelligence* transmitted being used in criminal proceedings[163]. Indeed, there is nothing to prevent the CMA from acting on the basis of a tip-off from another competition authority and launching a criminal investigation. However, the need to gather all the evidence a second time amounts to a serious burden (especially when the suspects have already been tipped off by the launch of the Commission's own investigation and may have, as a result, destroyed evidence), such that it is likely to be a severe deterrent to launching criminal proceedings.

3.6.5 Given that the Commission typically handles the largest and most serious competition infringements in the EEA, custodial sentencing is less likely to be available in those cases where the individual's actions caused the most harm. The UK's experience in prosecutions of the cartel offences appears to be typical: those prosecuted for the cartel offences have been employees of undertakings alleged to be part of cartels in national markets small enough not to attract the attention of the Commission. In most of these cases, the acquisition of the largest player's business on the cartelised market would be insufficient to trigger EU Merger Regulation thresholds.

3.6.6 The exception to the rule that all cartel offences cases have involved smaller scale cartels is the Marine Hose Criminal Investigation[164]. The Article 101 TFEU investigation into this case was undertaken by the Commission, but several defendants were found guilty of the original cartel offence in the UK. The Marine Hose Criminal Investigation is, however, the exception which proves the rule: the evidence against the cartelists was gathered not by the Commission or the OFT, but rather by the US Department of Justice, who placed under covert surveillance meetings in the USA attended by those convicted. As part of the subsequent plea agreement reached between the US authorities and the cartelists, the cartelists opted to plead guilty to the original cartel offence and serve prison sentences in the UK. Information necessary for these convictions was demonstrably not provided through the ECN.

### 3.7 Does the sequential enforcement of the criminal and civil rules cause harm?

162 See paragraph 15-523 Archbold Criminal Pleading Evidence and Practice 2018 Ed

163 Wouter Wils "Is Criminalization of EU Competition Law the Answer?", World Competition, Volume 28, No. 2, June 2005, pp. 117-159, paragraph 138

164 See *R v Whittle, Allison and Brammar* [2008] EWCA Crim 2560

3.7.1 As noted above[165], the CMA chooses to conduct its criminal and civil investigations sequentially, with the civil investigation only truly getting started once the criminal investigation has concluded.

3.7.2 The result of this is that it takes a very long time for the CMA's enforcement to finally conclude. The Galvanized Steel Tank cases took over four years from the criminal case being opened for the decision in the civil case to be issued. The Precast Concrete Drainage cases have been running for over five years (and continues to run). Additionally, given that cartels typically go undetected for several years and are then observed for several months in order for evidence to be gathered, the time taken from an individual or undertaking suffering injury from a cartel to their being able to recover damages for that injury can easily be over a decade.

3.7.3 Like the Commission, the CMA does not need to (and does not as a matter of course) determine the level of damages suffered by individual claimants in order to convict individuals, fine undertakings or disqualify directors. A follow on damages claimant must do this from scratch. However, the passage of time in a follow on damages claim which attaches to a civil cartel decision which itself follows on from a cartel offence conviction can be enormous.

3.7.4 For example, the decision in the Galvanized Steel Tank Civil Case (which a claimant would need to read in order to establish whether or not they had a claim) was published on 29 March 2017. The decision states that the cartel behaviour being punished commenced on 29 April 2005, 11 years and 11 months to the day before the publication of the decision establishing this fact. The majority of potential claimants are unlikely to keep records going back this far, meaning that they are unlikely to be able to make a claim for purchases made for the duration of the cartel.

**3.8 Can an act fall foul of the cartel offence but not breach civil competition law?**

3.8.1 Disposing of the criminal case prior to the civil case also raises an issue in relation to Article 101(3) and its CA98 equivalent[166] (together referred to as "**Individual Exemption**") given that even the "hardcore" behaviours described in the cartel offences could, theoretically benefit from exemption[167] under the civil prohibition while simultaneously amounting to an offence.

3.8.2 With respect to the original cartel offence, it is difficult to see how an arrangement fulfilling the criteria for Individual Exemption could be dishonest, except in contrived circumstances where an individual did "the right thing for the wrong reasons". The defences and exceptions introduced to the new cartel offence in order to make up for the lack of a dishonesty requirement are not a natural fit with Individual Exemption (with the possible exception of the defendant having taken legal advice).

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165 See paragraph 2.3.2 above

166 Section 9 CA98 (as amended)

167 Case T-17/93 *Matra Hachette v Commission*, paragraph 85

3.8.3 With respect to the new cartel offence however, there is the possibility that a defendant could enter into an agreement which qualified for Individual Exemption but also fulfilled all the criteria necessary for the new cartel offence.

3.8.4 For example, a person could enter into a technology transfer agreement which restricted passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor. Such an arrangement would potentially be block exempted by virtue of Article 4(1)(c)(i) or Article 4(2)(b)(i) of the Technology Transfer Block Exemption[168] and, as such not a breach of either the Chapter I or Article 101 prohibitions. The exemption recognises the efficiencies resulting from such a restriction, which is a form of market sharing.

3.8.5 The arrangement, contained within a commercially sensitive agreement between licensor and licensee, is unlikely to have been disclosed to customers or the CMA (meaning that the Publication Exemptions and Publication Defences are not available) and the defendant may enter into so many arrangements of this nature that she may not have sought legal advice (meaning that the Legal Advice Defence is unavailable). Given that the behaviour described is specifically authorised by the Technology Transfer Block Exemption, the example cannot be said to be contrived.

3.8.6 In such circumstances, a prosecution would likely fail the public interest test[169], however it is clearly not ideal for a potential defendant to be protected from personal liability by mere prosecutorial discretion for performing an act which attracts no consequences for her employer. The dual track approach also means that Individual Exemption arguments are unlikely to have been considered in detail by the CMA at the time that the decision to prosecute is made[170].

## 4. THE WAY FORWARD, NEED FOR CHANGE?

### 4.1 The cartel offence should be reserved for only the most egregious cases

4.1.1 As noted above, enforcement of the cartel offences has had several flaws, namely:

i. Very few cases are pursued;

168 Commission Regulation (EU) No 316/2014

169 Any decision to charge a suspect with either cartel offence must follow the Code for Crown Prosecutors, which sets out an evidential and a public interest test, both of which must be met

170 Note that in the CMA's investigation into Cleanroom laundry services and products in Case 50283, the defendants argued unsuccessfully that the Technology Transfer Block Exemption exempted their arrangement (see paragraph 5.218 of the decision). The CMA's decision rejected the application of the Technology Transfer Block Exemption on a number of grounds but only after what appears to have been a detailed review, which considered (among other things) market shares, the know-how (or lack of it) transferred between the parties, their competitive situation at the time of the alleged transfer and the changes to the arrangement

ii. Enforcement is highly unlikely to fulfil the CMA's own 10:1 public benefit target;

iii. Public awareness of the cartel offences is low;

iv. Public support for locking up cartelists is low

v. The nature of competition investigations means that the cartel offences are only pursued for smaller (i.e. arguably less serious) cartels;

vi. The time taken for civil and criminal cases to conclude is unlikely to be in the interests of justice and is particularly prejudicial to would-be follow on claimants; and

vii. It is possible for behaviour to fulfil the criteria of the new cartel offence but not the Chapter I/Article 101 prohibitions, as a result of the former not taking into account the possibility of Individual Exemption.

4.1.2 With regard to iii and iv above, the low public awareness and support are likely to have made the original cartel offence a dead letter and in part explain the low number of cases brought and even lower number of convictions. There does not appear to be any point in bringing further original cartel offence cases.

4.1.3 With regard to the new cartel offence, there may still be a need to prosecute in cases where an individual has gained so much and entered into price fixing, market sharing or bid rigging agreements so egregious that an example has to be made. In such cases, aggravating factors are likely to be present such that the cartelists' activities may also amount to fraud[171], however it would still be useful to have a specific offence to spell out what the cartelist had done wrong. It is likely to be only very occasionally that the public interest in bringing a prosecution is sufficient to outweigh the factors suggesting that no prosecution should be brought.

**4.2 Professional sanctions (including director disqualification) should be sought in all cases**

4.2.1 A DDO or DDU amounts to a black mark against the individual and may have a similar effect as a censure from a professional body where that individual is not a member[172]. All that needs to be shown is that the individual (a) was a director of a company which breached CA98 and (b) that the director's

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which had taken place. Were these factors irrelevant to what the CMA was trying to prove, it seems unlikely that such a detailed review would have been carried out.

171 See paragraph 3.3.4 above

172 As noted in paragraph 2.7.8 above, UK regulatory bodies can and do take independent action when a person who is regulated by them is involved in a breach of competition law.

behaviour makes her "unfit" to be concerned in the management of a company[173]. DDU proceedings are relatively simple (compared to cartel offence proceedings) and have historically been entered in to following the conclusion of a civil CA98 case, when there is little prospect of further document disclosure to derail the prosecution process should a prosecution to impose a DDO be required. In each case, the individuals would only have entered into the DDU if there were the credible threat of the CMA going to Court and obtaining a DDO.

4.2.2 DDO and DDUs are, currently, only available for persons who are currently company directors[174]. As a result, whether an individual personally involved in a breach of competition law might be disqualified as a director depends on how the undertaking which employs them is structured. If the undertaking contains relatively few legal entities, or if the undertaking does not include much of its management on the board of directors, then that company's employees are less exposed to DDOs.

4.2.3 There does not seem to be any compelling reason why a DDO or DDU should not be sought against someone who has not yet been made a director, if their conduct makes them unfit to be involved in the management of a company. The threat of a ceiling being placed on an ambitious staff member's career is likely to be as much (if not more) of a deterrent to that of the premature ending of a more senior employee's career. Research conducted by the OFT in 2010 suggested that reputational damage was an even more powerful driver of compliance than the threat of fines[175] and that the threat of DDOs was a useful driver of compliance[176]. Given the popularity[177] of naming and shaming individual cartelists, the British public are also likely to be in favour in a non-custodial penalty (if warranted) for the individuals involved in an infringement at the conclusion of proceedings.

4.2.4 Notably, in the Online Posters and Frames Investigation, the CMA only sought a DDU from the UK-based defendant, while the US Department of Justice pursued criminal charges[178].

### 4.3 Recidivism of Individuals

4.3.1 This Reporter is unaware of any instance where an individual who, having implemented one competition law infringement which was fined by a competition authority, subsequently went on to commit another. As a result, additional punishment at the individual level for recidivism does not appear to be needed.

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173 See paragraph 2.7.7 above

174 See paragraph 2.7.7 above

175 Drivers of Compliance and Non-compliance with Competition Law, OFT 1227, May 2010, paragraph 4.1.6

176 Drivers of Compliance and Non-compliance with Competition Law, OFT 1227, May 2010, paragraph 4.1.7

177 See paragraph 3.4.3 above

178 *USA v Trod* CR 15-00419-WHO

4.3.2 Further, defendants of the cartel offences have been senior employees (a pattern which is replicated in criminal cartel enforcement worldwide). The CMA's investigations into the cartel offences have typically taken several years and encompassed several years' worth of infringing activity. Unless the CMA's prosecution strategy changes, there are unlikely to be many employees who would be usefully deterred by uplift in sentencing due to recidivism, given that, by the time their sentencing for the cartel offence has concluded, they are unlikely to have long before reaching retirement age in which to become involved in a second criminal cartel, which is then discovered by the authorities. A DDO/DDU for a period of several years[179] also makes it unlikely that a senior employee will work in an equivalent position again after being disqualified the first time.

4.3.3 Preventing recidivism would, therefore, only seem to become an issue in the event that the CMA changed tactics and started prosecuting the cartel offence against more junior employees (e.g. sales team members implementing a cartel). Pursuing director disqualification against these individuals would be one way of doing this.

### 4.4 Monitoring changes in awareness as a result of enforcement activity

4.4.1 The CMA Survey was a one off: it was not based on a previous survey nor do there appear to be plans to do it again. The results are a snapshot of UK's businesses' awareness of competition law but they do not show whether understanding of competition law is getting better or worse with time. Other surveys into British attitudes to competition law infringements have been undertaken[180], but these are not directly comparable. While the YouGov 2007 Survey and YouGov 2014 Survey show changes to public attitudes in the UK to price fixing hardening over time, these changes appear to have been driven by the 2007 economic crisis and the attitudes towards "corrupt" business people than by enforcement action. Crucially, these surveys do not distinguish between business sectors, making them of limited use in determining whether CMA enforcement really does drive compliance.

4.4.2 A limited annual or biennial follow up to the CMA Survey would therefore be useful in order to determine the impact (if any) of competition law enforcement in a given region or industry on awareness of competition law in that region or industry. The CMA would then be able to make more informed decisions as to the kind of cases to pursue in order to achieve the greatest resulting awareness and deterrence.

### 4.5 Failure to prevent breaches of competition law

179 Daniel Trodd entered into a disqualification undertaking not to act as a director for five years following the CMA's decision in Case 50233 ("**Online Posters and Frames Investigation**"), Barry Kenneth Cooper was disqualified as a director for seven years following his conviction of the original cartel offence at the conclusion of the Precast Concrete Drainage Criminal Investigation.

180 The survey reported in Stephan (2008); the YouGov 2014 Survey; The impact of competition interventions on compliance and deterrence (OFT 1391, December 2011)

4.5.1 The Bribery Act 2010 ("**BA10**") was the first root and branch reform of UK bribery law in a century. The BA10 introduced an offence of "failure to prevent bribery"[181], under which a commercial organisation is guilty of an offence if a person associated with it bribes a third person on its behalf to obtain or retain business or an advantage in the conduct of business. It is, however, a defence for the defendant commercial organisation to show that it had adequate procedures designed to prevent persons associated with it from undertaking such conduct[182].

4.5.2 Given that the liability of the undertaking for breaches of the competition law prohibitions does not depend on it giving its consent to the anticompetitive conduct being conducted[183], there does not appear to be any real need to create a new head of liability for a failure to prevent a breach of competition law. However, additional incentives for undertakings to demonstrate that they had adequate procedures designed to prevent breaches of competition law prior to the breach of competition law may cause greater compliance. The current compliance discount offered by the CMA has only been applied to compliance programmes imposed *after* the infringement took place[184], however the CMA's Fining Guidelines are drafted in a sufficiently broad way to allow the CMA to take pre-existing compliance programmes into account[185]. Furthermore, with respect to the new cartel offence, the prospects of success for the Publication Exemption, Publication Defences and Legal Advice Defence can be greatly reduced in cases where a defendant has signed a competition compliance policy outlining the behaviours that are prohibited, thus demonstrating that any violations of this policy are highly likely to have been concealed from third parties. It makes sense in these circumstances to shift liability from the undertaking to the individual.

### 4.6 An EU-wide cartel offence?

4.6.1 One way of tackling the enforcement gap of individual criminal liability in Commission competition cases would be to create an EU-wide cartel offence. This offence could be prosecuted by National Competition Authorities ("**NCAs**") or the Commission itself.

4.6.2 The competition rules are almost unique within EU law in that they allow the Commission to take punitive action against entities other than the Member State signatories to the EU Treaties. Where EU

181 Section 7 BA10

182 Section 7(2) BA10

183 Case C-542/14, *VM Remonts*

184 See paragraph 2.6.4 above

185 Notably, on 20 April 2018, the Italian Competition Authority launched a consultation on its draft competition compliance guidelines, which explicitly set out separate discounts for compliance programmes in place before an infringement takes place and compliance programmes in place after an infringement takes place.

law has been used to create criminal offences, offences have not been created directly. Rather, Member States have been directed to create criminal offences themselves[186].

4.6.3 Criminal cartel enforcement powers were not popular with NCAs who responded to the Commission's consultation on empowering the national competition authorities to be more effective enforcers, which concluded on 12 February 2016. The Slovak competition authority noted the higher standard of proof required in criminal cases[187], while the Portuguese competition authority doubted that criminal law was suitable in competition cases[188]. Even the Irish competition authority, which arguably has had more success than any other EU NCAs in prosecuting individuals for competition offences was not in favour, noting that:

"Traditional criminal offences are not the most effective or efficient approach to ensuring compliance. The evidentiary requirements, the complex economic analysis involved in many cases and the criminal standard of proof are such that criminal prosecution is neither practical nor appropriate in most cases. With the exception of the simplest of hard core cartel offences (which may be more readily understood by a jury) NCAs will not be likely to adopt this approach and most undertakings will not treat these offences as a realistic deterrent. The higher standard of proof impacts the extent of the investigation to gather sufficient evidence, thereby impacting the time and resources required to present a case for prosecution. Given the competing cases, pending hearing the relevant prosecuting authority (if not the NCA) may prioritise enforcement against other more traditional (non-white collar crime) serious crimes."[189]

4.6.4 There are also serious political difficulties in introducing such an offence. The EU is not itself a State. It has no seat at the UN General Assembly and (more importantly) it has no ability to fine or imprison individuals (the European Court of Justice does not try cases against individuals and there is no "Euro-jail" in which to incarcerate defendants). The most widely accepted definition of the State, the body with a monopoly of legitimate physical violence in a given territory[190], precludes the existence of a different entity exercising physical violence against the individual (in the form of a deprivation of liberty) within the same territory. The EU's inability to use physical force is acknowledged in the manner in which the Commission conducts competition investigations. Dawn raids are typically carried out with the assistance of NCAs, who are able to break locks if necessary and arrest non-cooperative

186 See for example Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, which directed Member States to criminalise certain actions related to terrorism.

187 Antimonopoly Office of the Slovak Republic response

188 Portuguese Competition Authority response

189 Competition and Consumer Protection Commission response

190 Set out most famously in Max Weber's 1919 essay *Politics as a Vocation*

employees for obstructing investigations if needed. Where the Commission has been denied entry to premises, it has called local police.

4.6.5 It is difficult to see how a Commission-enforced EU-wide competition law criminal offence could exist without raising much wider and more fundamental questions about what the EU is and (more controversially) what its Member States have become as a result of their membership.

4.6.6 Less controversially, the Commission could factor in criminal cartel prosecutions into its investigations: for example through having NCAs gather evidence in a manner consistent with domestic criminal law and amending the Procedural Regulation so to allow for the use of transmitted information in the prosecution of criminal competition offences. This would mean that NCAs would, potentially, be able to rely on the evidence gathered in the largest, more far-reaching cartel investigations carried out in their territories in prosecuting criminal cartel behaviour.

**4.7 Brexit**

4.7.1 On 29 March 2019, the UK will leave the EU and, subject to final agreement, will enter into a standstill arrangement (during which it behave and be treated in EU law as if it were still a Member State) which is envisaged to conclude on 31 December 2020. At the time of writing, the UKCN members' relationship with the Commission and the NCAs of the remaining Member States from 1 January 2021 is anyone's guess, however there are likely to be memoranda of understanding in place between the UKCN and the ECN regarding the gathering and exchange of information as well as the provision of mutual legal assistance.

4.7.2 This presents the opportunity for the CMA, as head of the UKCN, to "take back control" of competition enforcement in the UK. Evidence gathered by the CMA in the UK for the purposes of providing mutual legal assistance in a Commission cartel case can be gathered in a manner consistent with PACE, making it usable in criminal proceedings. Conversely, any memorandum of understanding between the UKCN and ECN could reduce the restriction on the use of evidence in proceedings other than the enforcement of Articles 101 and 102 TFEU and their domestic equivalents so to include the cartel offences.

# Appendix: Questionnaire Questions and Where Answered

## I. Stock taking

In this section we would like to present the existing (*de lege lata*) rules on sanctions relating to the infringement of competition rules. These may address either corporate or individual liability, and impose criminal, or administrative (civil) sanctions. For the purpose of this section, we assume that antitrust rules are basically the same, copying or following closely Articles 101 and 102 TFEU.

*The rules*

1. Please identify the statutory provisions concerning competition law sanctions, and relevant guidelines issued by the national competition authority (CA).

***Please see sections 2.1 (Article 101/102 equivalents) and paragraph 2.6.3 (on fining guidelines)***

2. In addition to the rules in your jurisdiction's competition law, are there similar prohibitions imposed by criminal law? If so, please give a brief summary, comparison with the antitrust rules. Specifically, is the personal reach of criminal provisions wider, if so, who can be covered?

***Please see section 2.2 (criminal offences)***

3. Which types of sanctions can be applied in your jurisdiction in business-related breaches of law: monetary (corporate and individual), reparatory, custodial, disqualification (managerial, public tenders/contracts), others? *(Please note that this is a general question going beyond competition law.)*

***Please see section 2.6 (Sanctions against undertakings)***

4. Which types of sanctions can be applied in your jurisdiction for breaches of competition rules: monetary (corporate and individual), reparatory, custodial, disqualification (managerial, public tenders/contracts), others? (*For the purposes of this question, please consider procedural and enforcement kind of infringements as well.*)

***Please see section 2.7 (Sanctions against individuals)***

5. Can criminal law sanctions be imposed on corporations? Under what conditions?

***See paragraph 2.2.2***

6. Can punitive damages be imposed by a civil court (in addition to compensatory damages)?

***For legal persons, see paragraph 2.10.2, with respect to damages actions, and section 2.6 (sanctions against undertakings) with respect to fines imposed by authorities.***

***For natural persons see paragraphs 2.10.6 with respect to damages actions and paragraph 2.1.1 with respect to the applicability of fines imposed by authorities.***

*The goals*

7. Are the goals of imposing competition law sanctions defined by statute, case law, or guidelines of the CA?

***See section 2.4 (Competition authorities and their priorities)***

8. Is deterrence, retribution or compensation the primary goal? Are there other goals for sanctions?

***See section 2.4 (Competition authorities and their priorities)***

9. Can the goals pursued by the CA which impact the nature and magnitude of the sanction to be imposed be identified (from the law, fining guidelines or individual decisions)?

***See section 2.4 (Competition authorities and their priorities)***

*Determination/calculation of sanctions*

10. Are there hard or soft rules on how to determine the amount/length, etc. of the sanction?

***See sections 2.6 (sanctions against undertakings) and 2.7 (Sanctions against individuals)***

11.Do these rules take into account other sanctions imposed by other bodies against the same person for the same conduct?

***See section 2.5 (Ne bis in idem)***

12. To what extent, if at all, does the imposition of a sanction on an employee affect the sanction that will be imposed on an employer, or vice-versa?

***See section 2.8 (The relationship between sanctions against individuals and undertakings)***

13. Can the existence of a genuine compliance programme be used to mitigate the fine imposed upon companies for the competition law violations of their employees?

***See paragraph 2.6.4***

*Enforcement*

14. As far as the enforcement of competition rules are concerned, which of these is dominant in your jurisdiction: administrative/civil/criminal/quasi criminal (administrative penalty/misdemeanour law)?

***See paragraph 3.5.1***

15. If there are competition related prohibitions in other laws than competition law, which institutions and which procedures are used to enforce them?

***See paragraph 2.4.11***

16. Provided that there are multiple institutions involved in enforcing and punishing unlawful conduct, is there a mechanism in place to coordinate the imposition of sanctions by different institutions?

***See paragraph 2.4.8***

17. Does a corporate leniency application have an impact on individual sanctions?

***See paragraph 2.6.1***

*Parent liability*

18. Can the parent company be held liable and be fined for the wrongdoing of its subsidiary?

***See section 2.11 (Parental liability)***

19. If so, what test is used to impute liability to the parent? Can the parent rely upon a compliance defence (i.e., that it took all reasonable efforts to prevent the violation) to reduce/avoid the fine?

***See paragraph 2.11.5***

20. If so, do any presumptions exist for the imputation of liability to the parent (for example, the presumption that a parent exercises decisive influence over a wholly-owned subsidiary)? Are the presumptions rebuttable or irrebuttable?

***See paragraph 2.11.5***

**21. If so, how is its fine calculated?**

***See paragraph 2.6.3***

*Associations of undertakings*

22. How is liability for breaches of law allocated between associations of undertakings and their member undertakings? Are both of them fined? If just one of them is fined, how does the CA make this decision?

***See paragraph 2.6.8***

23. Do fines imposed on associations of undertakings reflect the turnover of the association or that of its members? Please differentiate between the maximum of the fine and the actual method used by the CA to calculate the fine.

***See paragraph 2.6.8***

24. What methods are available for the association to request financial contribution from its member undertakings to pay the fine? Can the CA itself establish a secondary liability for the members to pay the fine?

***See paragraph 2.6.9***

*Individual sanctions on CEOs/employees (in case of overlap with previous questions, please refer to the relevant number)*

25. Do your statutes allow for the imposition of sanctions on CEOs or other senior employees? If so, what are these sanctions? Are these sanctions administrative, civil or criminal in nature?

***See section 2.7 (Sanctions against individuals)***

26. Can individual sanctions be imposed for the infringement of any competition law rules, or only for the most serious ones (i.e. cartels)?

***See section 2.7 (Sanctions against individuals)***

27. Are these sanctions imposed in the same procedure which targets the undertaking?

***See section 2.3 (Relationship between the civil and criminal prohibitions)***

If not, are there special procedures for this purpose? Is this conducted by the CA?

***See section 2.7 (Sanctions against individuals)***

.28. Is there a link between the decision sanctioning the undertaking and the one addressed to the individual person in the case of a successful legal challenge before a court?

***See section 2.3 (Relationship between the civil and criminal prohibitions)***

29. To what extent have these sanctions been used? Are there studies about the effectiveness of individual sanctions?

***With respect to extent, see Section 3.5 (Is there sufficient enforcement?). With respect to effectiveness studies, see footnote 37.***

30. If there are no such sanctions, has there ever been intent to introduce it? If so, why did it fail?

***Not applicable.***

31. If there are no such sanctions, what hurdles to their introduction and successful use do you see in your national legal system?

***Not applicable.***

32. Is criminal liability (or are other sanctions) imposed on individual employees for procedural breaches (for example, destroying documents or providing false information)? To what extent have such sanctions been used?

***See section 2.9 (Additional sanctions for non-cooperation)***

33. If there is a leniency programme in place for employees as well as for companies, how does that application of that programme to employees relate to its application to companies?

***See paragraph 2.6.1***

*Employee/director indirect financial liability*

34. Can corporations sue, for damages or compensation, their employees or directors who participated in the unlawful conduct? If so, under what circumstances? Please summarize the relevant court cases.

***See paragraph 2.6.7***

35. Do director insurance policies cover this type of liability?

***See paragraph 2.10.5***

## II. Are present sanctions efficient/sufficient?

In this section we would like to gather intelligence to evaluate to what extent existing sanctions are efficient. We are aware that it is difficult if not impossible to measure exactly the effectiveness of sanctions. Often there is a self-interest issue distorting responses: why would CAs acknowledge the lack of existing sanctions? Also, why would attorneys/corporations admit that corporate fines are not sufficient and there would be a need for more severe individual sanctions? By efficient sanctions we mean that either their actual imposition, or the realistic likelihood of their imposition soon after the breach would deter the same company, and others from the wrongdoing.

36. Please provide data on sanctions applied in practice between 2013 and 2017:

- The 5 highest fines imposed in one procedure (involving more individual fines)
- The 5 highest fines imposed on individual undertakings
- The 5 highest fines imposed on individuals (be it administrative, misdemeanour or criminal)
- The 5 longest director disqualification orders
- The 5 longest sentences of imprisonment

(*in case of lack of cases, especially for the last three sub-questions, please feel free to extend the relevant period for five more years*)

***See tables 1-4 in section 3.1 (Largest Sanctions)***

37. Have studies been published in your jurisdiction about the effectiveness of existing sanctions (i.e. by the CA, research institutions, etc.)? If so, please provide a summary and a link/reference.

***See footnote 37 and section 3.3 (Are the British public aware of competition law?)***

38. How often are criminal sanctions enforced? Please give a list of cases decided in the last five years.

***See table 3 in section 3.1 (Largest Sanctions)***

39. If criminal sanctions are not enforced in practice, is there evidence that their deterrent effect is vanishing? Or, is even a small chance of being punished a deterrent?

***See section 3.3 (Are the British public aware of competition law?)***

40. Is recividism (repeat infringement of the same or similar unlawful conduct) a problem in your jurisdiction? Can you mention cases, examples which show that present sanctions do not deter the same or other companies from infringing the competition rules?

***See section 4.3 (Recidivism of individuals)***

41. Does the CA increase fines/other penalties due to recividism? If so, to what extent? Is recividism considered at a group level, including not only the corporation but parents and other companies belonging to the group of undertakings?

***See paragraph 2.6.5***

42. Can individual sanctions (administrative or criminal) be imposed in the case of recividism?

***See section 4.3 (Recidivism of individuals)***

## III. The way forward, need for change?

In most jurisdictions, fines are imposed on corporation and not on those individuals who organized/participated in the unlawful conduct. Managers are interested in the achievement of profit-related figures, even risking potentially unlawful conduct, whereas sanctions are imposed not on them, but on the company. In many instances, responsible individuals are not even at the company when it comes to the imposition of the sanction (four-five years after the unlawful conduct had taken place). Corporations do not seem to have a positive track record in effectively enforcing measures to punish their responsible employees/directors who actually committed the unlawful conduct.

Even though criminal sanctions could have positive effects, the lack of their consistent and frequent application will undermine their deterrent effects. Over-criminalization of business related unlawful conduct combined with poor enforcement is a general problem in many jurisdictions. There may be other means to induce management to comply with competition rules. There is a need for personal liability and personal sanctions: fines, disqualification measures.

43. Please explain your suggestions how the existing system could be improved (new rules, change in enforcement, etc.). The questions below are not mandatory; they are just meant to give you some ideas about potential issues to be considered.

- The principle of gradualism: shall individual sanctions be encouraged in case of recividism, in addition to corporate sanctions?
- Are there existing sanctions applied in different fields of law relating to business that could also be applied in competition law?
- Are there existing sanctions relating to procedural or enforcement breaches of law which could also be introduced for breaches of substantive rules?

- Are some remedies more appropriate for one or another defendant and could more than one be employed (targeting different defendants) in the same matter?
- Is there an argument for adopting the sanctions scheme from the jurisdiction where a defendant lives/operates?
- During the consultation of a draft directive on national procedures/sanctions, most stakeholders stated in the public consultation that criminal systems are less suited for the effective enforcement of the EU competition rules. Do you agree with this statement?
- Could or should EU law incorporate individual sanctions?

***See Part 4 (The way forward, the need for change?), as well as the conclusions set out in Part 1.***